Supreme Court, U. S.
FILED
JUN 30 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1652

LYLE S. WOODCOCK,
PETITIONER,

v.

R. W. AMARAL,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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LYLE S. WOODCOCK,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Lyle S. Woodcock, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit, entered on December 26, 1974, as amended March 4, 1975.

OPINION OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the First Circuit, printed in Appendix A hereto, is reported at 511 F.2d 985, and the memorandum and order of the

United States District Court for the District of Massachusetts, printed in Appendix B hereto, is reported at 373 F. Supp. 644.

JURISDICTION

The judgment of the court below and the court's initial opinion was entered on December 26, 1974. A timely petition for rehearing was allowed in part, and an amended opinion (Appendix A hereto) issued on March 4, 1975, per Memorandum and Order, printed in Appendix C hereto. A timely Second Petition For Rehearing was denied on March 31, 1975, as per Appendix D hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), since Petitioner seeks review of a decision of a court of appeals.

QUESTIONS PRESENTED

1. Is it error of constitutional dimension that the grand jury here returned indictments on insufficient evidence?
2. Did the prosecution's deliberate suppression of several pieces of highly material evidence deny the Petitioner due process of law?
3. Because the indictments were obtained essentially by the Massachusetts legislature, was Petitioner denied equal protection of the laws?
4. Was the denial of severance and this record of Petitioner's ensnarement at trial final proof that the "mass trial" technique is fundamentally incompatible with due process of law, or at least that some limits must be set?
5. When Petitioner's substantive bribery conviction could be affirmed only by applying a statute passed a year and a half after trial, was it a denial of due process of law as an application of law *ex post facto?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America

Article I., Section 9.

". . . ."
". . . ."
"No Bill of Attainder or ex post facto law shall be passed."

* * * *

Article I., Section 10.

"No State shall . . . pass any Bill of Attainder, ex post facto law . . . ."

Amendment XIV

Section 1.
". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . ."

Mass. Gen. Laws

Chapter 274, Section 1.
"A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors."

Chapter 274, Section 2.
"Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling,

hiring or otherwise procuring such felony to be committed, shall be indicted, tried and punished as a principal."

1973 Massachusetts Statutes, c. 529, § 1.

"Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon."

STATEMENT OF THE CASE

Even though the underlying petition for habeas corpus here grew out of the longest criminal case in the history of Massachusetts, the parties have managed to reduce the very lengthy record to a relatively brief agreed upon record appendix containing only the relevant evidence, stipulations and agreements. The subsidiary facts are therefore undisputed.

On May 8, 1964, the Petitioner and other employees of, so-called, "small loan companies" and their companies were indicted, together with some state officials, in 129 indictments by a special grand jury in Massachusetts, charging that they conspired to bribe and had offered or given bribes to the officials. This Petitioner, an executive vice president of Liberty Loan Corporation, was named as a defendant in three indictments which were joined for trial with 45 other indictments involving 72 separate counts against 14 other defendants. The jury trial lasted for five months, from July 18, 1966 until December 18, 1966, and the Petitioner, along with most of his co-defendants (some received directed verdicts), was found guilty. He was sentenced to 2½ to 3 years in the Massachusetts state prison on the substantive indictment and to one year in

the House of Correction concurrent on each conspiracy indictment on and after the state prison sentence, all sentences being stayed pending appeal.

The next year, on July 17, 1967, on his motion, Petitioner and others were set to trial in the, so-called, "second small loans trial" on a total of 21 indictments, one of which (the only other one against Petitioner) charged Petitioner with conspiring to bribe one Martin J. Hanley (the principal state official involved in the first trial) on another matter. After six months of trial, Petitioner and his employer received directed verdicts of acquittal, all the other "first small loans trial" defendants going on, six months later, to be convicted again. Some of the evidence that came to light during that second trial was the basis for a motion for new trial in the first case, the denial of which is the subject of the second issue presented herein.

The processing of the "first small loans trial" appeals was deferred until the completion of the "second small loans trial", consolidated with them, and on November 4, 1971, the Massachusetts Supreme Judicial Court affirmed all of the convictions, only four of the court's seven justices sitting on the case. *Commonwealth* v. *Beneficial Finance Company*, 1971 Mass. Adv. Sh. 1367, 275 N.E.2d 33. The stays of execution of the sentences were not revoked pending the defendants' applications for writs of certiorari to this Court, which on June 12, 1972, denied the petitions, Mr. Justice Douglas noting in his opinion that some petitions should have been granted. 407 U.S. 910, 914 (1972).[1] Petitioner began serving his sentence.

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[1] The Court is asked to disabuse itself of any notion that denial of review is automatically dispostive of the issues here. Responsibly negotiated stipulations have here finely focused the record; the Court of Appeals opinion sharpens the issues considerably; and other court opinions in the intervening three years render review now more propitious.

The subject petition for a writ of habeas corpus was then filed five weeks later, on July 20, 1972, in the United States District Court for the District of Massachusetts, Caffrey, C.J. took briefs and heard oral argument on an agreed record, and on April 1, 1974, filed a Memorandum and Order allowing Respondent's motion to dismiss the petition. (Appendix B) An appeal to the United States Court of Appeals for the First Circuit was duly prosecuted, and the dismissal affirmed in an initial opinion on December 26, 1974. The opinion was amended, after allowing in part a petition for rehearing, on March 4, 1975, and a second petition for rehearing was denied on March 31, 1975.

The nature of the issues presented is such that each is grounded on a compartmented and focused quantum of evidentiary fact — most of the trial testimony is immaterial — and rather than fragment them here seriatim, the Court will be assisted if they are woven into the respective arguments. If the Court will indulge this slight deviation from the normal format, Petitioner is confident that it will soon become obvious that comprehension will be thereby assisted. A general factual background, however, will make the particularized arguments comprehensible.

The object of the conspiracy and bribery was to insure that the, so-called, 1962 Rate Board did not lower the rate of interest that could be charged on small loans in Massachusetts. Martin J. Hanley was the Deputy Commissioner of Banking, supervised the small loans industry, and was to present the case to the Rate Board meeting toward the end of 1962. The agreement to bribe Hanley, and through him at least some of the Rate Board, was made at a meeting in a hotel in New York on October 17, 1962. Petitioner was at the meeting, as was one William Heath, the local public relations executive for American Investment Company, another loan company. It was the trial

testimony of Heath that convicted the defendants. The prosecution admitted that without him it had no case. In the more than 7,500 pages of trial testimony two incriminating sentences were attributed by Heath to this Petitioner at that meeting, and he is not mentioned as having said or done anything, either personally or through an agent, either before or after that one meeting. There was substantial other incriminating evidence against the other defendants, but this Petitioner was convicted on those two sentences alone.

REASONS FOR GRANTING THE WRIT

1. Whether the Return of Indictments on Insufficient Evidence Is Error of Constitutional Dimension Needs Clarification.

Two days after receiving all the relevant grand jury testimony in the course of trial, Petitioner filed a motion to dismiss on the ground that there was insufficient evidence before the grand jury to permit the return of indictments and therefore constitutional error. It was stipulated that the 25 pages of grand jury testimony attached to the motion was all the relevant evidence which served as the basis for the indictments against this Petitioner. The motion was denied, and the denial affirmed in the state court, principally on the ground that the return of an indictment on insufficient evidence is not an error of constitutional dimension, and that was the sole ground for also finding no constitutional error in the two lower Federal courts.[2]

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[2] Should the petition be granted to encompass this issue, Petitioner would perforce have to address himself to the question of whether the evidence *was* insufficient, a fact undetermined so far by any court.

An unnecessary dictum in *Costello* v. *United States*, 350 U.S. 359, 363 (1956) was the linch pin for the rulings of all four courts on this issue:

> ". . . If indictments were held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."[3]

As the Circuit Court here correctly noted, at 993, "[t]his language was partially repeated in *Lawn* v. *United States*, 355 U.S. 339, 349-50 (1958), and more recently in *United States* v. *Calandra*, 414 U.S. 338, 345 (1974)."[4] The Petitioner pointed out to the lower court that in all those cases

[3] This Petitioner also asserts a Fourteenth Amendment denial of equal protection of the laws.

[4] *Holt* v. *United States*, 218 U.S. 245 (1910), is cited in *Calandra*, page 347, in addition to *Costello*, as holding that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of *inadequate* or incompetent evidence." (Emphasis supplied) *Holt* does not so hold. As the Court correctly noted in both *Costello* (at page 363) and *Lawn* (at page 349), *Holt* dealt—and even then, only in passing—only with "whether an indictment should be quashed because supported [the word in *Costello*, 'procured' in *Lawn*] in part by *incompetent* evidence." (Emphasis supplied) It only compounds the mischief of *Costello's* one-word surplusage to cite the case as *holding* that "inadequate" evidence cannot be challenged, and then reinforce that with an entirely inapposite citation of *Holt*, a case which does not even support the dictum with dictum.

what was in issue was the *kind* of evidence before the grand jury, rather than the *quantum* of evidence as here — hearsay evidence in *Costello* and illegally obtained evidence in the other two. Judge Moore below (sitting by designation) specifically recognized this distinction, and thusly summarized Petitioner's argument: ". . . the appellant would dismiss the use of 'inadequate' by the Supreme Court in the above-quoted passage as 'unfortunate dictum.' " Petitioner here reasserts the argument: "inadequate" *was* "dictum" and *was* "unfortunate"; it helped work substantial injustice here, and, unless corrected, has the capacity to do so again thousands of times. The First Circuit, however, said it could not construe that one unnecessary word of *Costello* as "mere dictum", concluding, at 993: "That task is for the Supreme Court, should it ever be so inclined." Perhaps overly optimistically, Petitioner reads into those words a respectful echo of his request that the Court now do so.

Petitioner has no quarrel with the holdings of *Costello*, *Lawn*, or *Calandra*, that the "*character*" of grand jury evidence is constitutionally not open to question, but even the reinforcing policy to avoid interrupting the grand jury with "tangential litigation" argues against extending that prohibition to include attacks against *insufficient* grand jury evidence. Here the First Circuit even specifically recognized Petitioner's argument that grand jury interruption "would normally not be a problem when only the adequacy of the evidence is at issue" (page 993, n. 16) because a defendant would have the grand jury testimony to argue from, of course, only after indictments are returned. Adoption of Petitioner's argument would not therefore serve as the basis for any "fishing expedition" to obtain the grand jury testimony; it would come into play only in those cases where the defendant already has the testimony. Engrafting the *Costello* dictum into law there-

fore results in the unseemly picture of a court, literally, closing its eyes to an injustice. That is not when the goddess is blindfolded. The adoption of Petitioner's argument would also prod prosecutors to avoid their present often *pro froma* grand jury presentations, which is part of the reason for the burgeoning chorus of criticism of the institution of the grand jury. In cases of simple oversight on an indictment justified on all the evidence, the prosecutor need not only go back before a grand jury and put on the additional evidence. But when there is not enough evidence for probable cause, it is a corruption of the grand jury system and constitutionally unjust to force a defendant to run the gamut of trial. A court should be in a position "to prevent the wrong before it occurs", as the Court observed in *Calandra,* page 346, in a slightly different context. An observation of the Court of Appeals opinion in *Calandra,* while addressed to Fourth Amendment rights, is not inappropriate here:

> ". . . [There is an] increasing concern of law enforcement with 'organized crime' and with conspiracies . . . . Under such circumstances, the temptation to ignore the rights of individuals not involved or thought crucial, in order to obtain knowledge useful in investigating the larger suspected illicit enterprise, is natural and understandable." *United States* v. *Calandra,* 465 F.2d 1218, 1226 (6th Cir. 1972).

One of the "little fish" caught in a broad-ranging grand jury investigation, as was Petitioner here, should be afforded the right to demonstrate at the earliest opportunity that the net was cast too broadly.

A dictum of the Court, apparently contrary to the one in *Costello,* in *Russell* v. *United States,* 369 U.S. 749, 770 (1962), has also helped breed confusion on this issue be-

cause the Court there observed that it is unacceptable that a defendant ". . . be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." The lower court here did not feel constrained to comment on this apparent contradiction, nor on these statements of Mr. Justice Burton, supportive of Petitioner's argument, concurring in *Costello* itself, at page 364, and cautioning against the very misinterpretation of the opinion that has occurred:

> ". . . [T]his case does not justify the breadth of the declarations made by the Court. I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment that indictment should be quashed."

The First Circuit also chose not to comment on Petitioner's argument below that its own decision in *Connor* v. *Picard,* 434 F.2d 673 (1st Cir. 1970), *reversed on other grounds, sub nom. Picard* v. *Connor,* 404 U.S. 270 (1971), accepted Petitioner's contention in an analogous case, concerning the constitutionality of the Massachusetts, so-called, John Doe indictment, where the grand jury does not know the identity of an individual and leaves that to be supplied later by the prosecutor if he learns additional facts. The court posed the issue thusly, on page 674:

> ". . . On the contrary, the grand jury itself has said that there was insufficient evidence to indict [the habeas corpus petitioner], and we accept that as true . . . . The question is whether, since the jury

concededly did not find probable cause, petitioner has a constitutional complaint."

The court then held the conviction on such an indictment unconstitutional. Conceptually, nothing turns on whether there "concededly" is insufficient evidence or whether a court so holds, presented with the evidence. It is simply unconstitutional to return an indictment without probable cause, and the clarification of *Costello* here petitioned for will preserve that right to defendants who can so demonstrate.

2. The First Circuit's Opinion on the "Brady Error" Issue Makes Even More Imperative That the Court Resolve the Burgeoning Conflicts in This Vital Area.

While noting that "[o]ther courts have adopted a variety of standards for the determination whether the prosecutor's failure to disclose exculpatory evidence... requires a new trial", the lower court here adopted the Second Circuit's "variable standard" of materality in assessing constitutional error under the rule of *Brady* v. *Maryland,* 373 U.S. 83 (1963). That theory was conceived by Judge Friendly in *United States* v. *Keogh,* 391 F.2d 138 (2d Cir. 1968), and that opinion sired many progeny in many Circuits, including some mutants. Aside from the burgeoning yet abberrational applications of the *Keogh* theory in several Circuits—a recent review of the cases prompted the Eighth Circuit to observe diplomatically: "[t]he standard of materiality has varied greatly"[5] —this Petitioner maintains that the theory is fundamentally at variance with the rule of *Brady,* and that the Court should use the vehicle of this case to so declare,

[5] *See*, *Evans* v. *Janing*, 489 F.2d 470, 477, n.19 (8th Cir. 1973).

or, at least, if the Court were to deem the *Keogh* approach appropriate, take the occasion to resolve the obvious conflicts between the Circuits which are growing more complicated and more sophisticated daily. The passage of more time will perforce render the eventual required resolution not only more difficult, but more traumatic.

Even the most casual survey of the cases makes it obvious that the Court is fully aware of at least the need for clarification. Certiorari has been denied in dozens of cases in the last few years from Court of Appeals decisions of various hues. Following *Brady,* the Court in *Giles* v. *Maryland,* 386 U.S. 66, 74, n. 19 (1967), declined to decide "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial." Only two relevant opinions have been handed down since, *Giglio* v. *United States,* 405 U.S. 150 (1972), and *Moore* v. *Illinois,* 408 U.S. 786 (1973), and they each cite *Keogh,* but only in passing; the Court declined each opportunity to adopt the *Keogh* approach, but did not abrogate it, so the Courts of Appeals, as here, keep it viable. The suppression in *Giglio,* in fact, was far less "deliberate" than here. The *Keogh* analysis, as applied here, requires a more and more obvious materiality, a higher probability that the suppressed evidence would have affected the jury, as the "culpability of the prosecution" decreases from "deliberate suppression" (the easy cases, such as *Miller* v. *Pate,* 386 U.S. 1 [1967]) to "negligent nondisclosure" to "innocent miscalculation", the latter term utilized by the court below to characterize the two most important suppressions here. This Petitioner maintains that such a theory is contrary to the decisions of this Court and works an impermissible vitiation of the constitutional right at issue. It is hoped that the Court will take this opportunity to lay this theory to rest.

3. The Lower Court's Approval of Petitioner's Indictment by the Massachusetts Legislature Is Contrary to This Court's Consistent Interpretation of the Equal Protection Clause and Should Not Be Let Go Uncorrected.

Petitioner has throughout maintained that he was, essentially, and uniquely, indicted by the Massachusetts legislature, and that this was in violation of both the Equal Protection Clause of the Fourteenth Amendment and the principle of separation of powers, but the court below held "that no valid constitutional claim" was thereby raised because Massachusetts, faced with "[c]orruption in government", could validly "conclude that special measures were necessary". The court cited but one authority, *Johnson* v. *Louisiana,* 406 U.S. 356 (1972), as being analogously supportive.

There surely were "special measures" utilized to secure these indictments, as the court put it, and all these underlying facts are admitted. Agents of a special Massachusetts legislative committee (who specifically and formally considered procuring indictments a proper legislative function) investigated this case, then asked the Attorney General to empanel a Special Grand Jury, and were then sworn in as Special Assistant Attorneys General minutes before presenting the case to the Special Grand Jury. These legislative agents continued to work simultaneously for the special legislative commission, were always paid from a special legislative appropriation, revealed to other members of the legislative commission, including even non-lawyers, matters which had occurred before the Special Grand Jury, and, with as many as five of them in attendance at one time (obviously to highlight the special importance of the case), procured the indictments from the Special Grand Jury—the first time in two hundred years

of Massachusetts history that a Special Grand Jury had returned indictments while a regular grand jury was sitting. "Special measures", indeed! It is sheerest sophistry to waive the bloody shirt of "corruption in government" in these days and, ostensibly, make it the basis to ignore the unique, purposeful, unequal discrimination which resulted in Petitioner's indictment by legislative agents. The First Circuit somehow found in all of this "special" legislative action a "rational purpose behind the state's decision", *i.e.,* an "attack" on "corruption in government", and, therefore, on the basis of *Johnson* v. *Louisiana, supra,* no constitutional infirmity. That case is inapposite. First, it is one of a special class of equal protection decisions (and the main attack in the case was actually under the Due Process Clause) addressing the issue of whether a state statute invidiously constructed a special class of citizens. Second, in letting stand a statute permitting convictions by juries of less than twelve, the Court recognized that the statute applied to *all* citizens accused of a particular crime. Here, only Petitioner's co-defendants were subjected to these special procedures. These were not general statutory provisions applicable to a logical category of citizens.

Petitioner does not take issue with the individual propositions that a state can approve a legislative commission submitting evidence of criminality that comes to its attention to the Attorney General, or allow a legislative counsel to be subsequently made an Assistant Attorney General, or see the need for five prosecutors before a grand jury in a particular case, or even for an Assistant Attorney General to be paid from a legislative appropriation. Petitioner recognizes that mere irregularities in local practice do not of themselves deny constitutional rights, *Thorington* v. *Montgomery,* 147 U.S. 490 (1893), and that the imperfection of man does not necessarily concern either the

Constitution or this Court, *Chicago Life Insurance Co.* v. *Cherry,* 244 U.S. 25 (1917), but Petitioner sincerely submits that this cumulation of proven inequalities worked a classic denial of equal protection of the laws as the Court has consistently delineated that particular constitutional right. The lower court simply ignored those decisions, despite Petitioner's specific citation of many of the Court's cases.[6] It is precisely this kind of realistic cumulation of inequalities, "the totality of circumstances", which this Court has for almost a century consistently looked to in assessing denials of equal protection of the laws. Ever since *Neal* v. *Delaware,* 103 U.S. 370 (1881), held that on *all* the facts the defendant was unequally treated by the state courts, this Court has eschewed a fragmented standard and recognized that an aggregate of inequalities is the constitutional fulcrum in this area. When the law was, considering *all* the facts, applied "with an evil eye and an unequal hand", it was held unconstitutional to impinge a Chinese laundryman's right to operate his business the same as others. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886). When the *totality of the evidence* demonstrated that a citizen was denied equal access to the courts, it was struck down as unconstitutional. *Truax* v. *Corrigan,* 257 U.S. 312 (1921). When an examination of myriad practices over thirty years showed a systematic exclusion of blacks from grand and petit juries, that constituted a denial of equal protection, *Patton* v. *Mississippi,* 332 U.S. 463 (1947), and the *overall* pattern was the determinative, even though each single practice was not of itself sufficient. *See also, Hernandez* v. *Texas,* 347 U.S. 475 (1954). An assessment of the cumulation of facts has always been the Court's touchstone in determining if there has been a denial of equal protection of the laws, whatever particular inequality was claimed, be it housing, *Shelley* v. *Kramer,* 334 U.S. 1 (1948), education, *Brown* v. *Board of Education,* 347 U.S. 483 (1954), voting, *Baker* v. *Carr,* 369 U.S. 186 (1962), or municipal facilities, *Watson* v. *Memphis,* 373 U.S. 526 (1963). The Court must be ever alert not to permit such a shining edifice, constructed of such dear sacrifices, to be undermined, and here it starkly has been. This is an occasion to pay the small "price" of "vigilance".

[6] While the decision appealed from did not *specifically* rule contrary to this Court's decisions—cannot be said to have done anything more overt than to "ignore" them—the Massachusetts Supreme Judicial Court opinion disposed of this issue by specifically fragmenting the elements of inequality forwarded by Petitioner, and then *separately* held each was not a ground to void an indictment, concluding: "Having disposed individually of the objections . . . , we cannot see that they gain any additional strength by cumulation." *Commonwealth* v. *Beneficial Finance Company*, 1971 Mass. Adv. Sh. 1367, 1378, 275 N.E. 2d 33, 58. Chief Judge Caffrey's opinion in the District Court here specifically approved this "proper disposition of these contentions" by the state court. Appendix B, *infra.*

4. Petitioner's Conviction at a Classic Mass Conspiracy Trial Provides a Vehicle for the Court to Set Some Limits on the Use of This Unjust Technique.

The First Circuit opinion disposed of Petitioner's contention that his conviction at this classic mass conspiracy trial was a denial of due process by utilizing the shibboleths that have for too long permitted this unjust technique to survive. The facts of the case present the Court with an attractive opportunity to at least set some realistic constitutional guidelines in this neglected area.

Petitioner was set to trial as one of 15 defendants in 48 indictments having 77 counts. Until "the second small loans case" the next year, at which Petitioner was acquitted, the trial was the longest criminal trial in Massachusetts history. Petitioner was a defendant in only 3 indictments having a total of 4 counts. The trial transcript consists of 103 volumes containing more than 7,500 pages, but

in all of that there are but *two sentences — two sentences* — testified to by *one witness — one witness* — incriminating Petitioner. Those two sentences were "in substance" to the "best of my memory" some four years after they were allegedly uttered, and the witness had never previously ascribed so much as one word to Petitioner in many appearances before the Crime Commission and the Special Grand Jury. After the prima facie finding of conspiracy, the trial judge changed the original very detailed limitations on 48 items of evidence, 27 of which he then admitted against the Petitioner, some only on specified counts or certain indictments. It took more than an hour and a half just to read these changes in limitations to the jury. A chart showing the original and extended limitations appears as Appendix E hereto. Of course, there were volumes of additional evidence, damaging to other defendants, which were never admitted against Petitioner. While a computer could perhaps be programmed to keep this evidence correctly sorted "into separate intellectual boxes", *People* v. *Aranda,* 47 Cal. Rptr. 353, 359-360, 407 P. 2d 265, 271-272 (1965), it would take a "willing suspension of disbelief" to expect such a performance from any jury. Yet that is what the lower courts presumed. Petitioner maintains that the severance he continuously sought should have been granted, and that it is a pretense to say the jury ignored the unadmitted damaging evidence ensconced in a pageantry of varying limitations and objectively determined Petitioner's guilt only on the jots admitted against him.[7]

[7] The Massachusetts Supreme Judicial Court even recognized the realities, but maintained the old fiction:

> "... [I]t is highly improbable that the jury could or did remember all the limitations on all the evidence, but to return a guilty verdict against a defendant it was necessary that they remember only the limitations on that part of the evidence which was critical to sustain a conviction against that defendant .... There is no indication that the jury could or did not comprehend the limitations. 'We see no reason to depart from our rule that jurors are expected to follow instructions to disregard matters withdrawn from thei: consideration.' " *Commonwealth* v. *Beneficial Finance Company*, *supra*, at 1476.

In effect, the Supreme Judicial Court said that Petitioner's convictions demonstrated that the jury had been sufficiently *in*clusive, and that the court would assume that it had been properly *ex*clusive, though not recognizing that it was "highly improbable" that it could have been so.

Judge Caffrey said Petitioner had not proven that the jury did not follow the trial court's instructions, and, similarly, the First Circuit blandly opined:"... [W]e cannot assume that the jury was so irresponsible that it did not assess the case against each defendant ...."

This Court has, over the years, many times specifically recognized at least the potential for injustice posed by cases such as this one, the mass conspiracy or conspiracy-substantive trial,[8] and similar recognitions abound in the Courts of Appeals, but reversals because of a denial of due process are few, and the constitutional parameters vague. The usual prophylactic has been the proposition that juries follow the often ritualistic instructions — "unmitigated fiction", in Mr. Justice Jackson's famous dissenting phrase. *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949). But the Court recognized the reality that jurors are people, not computers, in *Bruton* v. *United States,* 391 U.S. 123 (1968), and the fresh breeze of that opinion could well serve as the basis for the Court now to set down some constitutional limitations on the mass trial technique. It is "a distinction without a difference" that the *Bruton* framework was the Confrontation rather than the Due Process Clause. The importance is that the Court, once again, anchored in the real world, recognized

[8] See, as examples, *McElroy* v. *United States*, 164 U.S. 76 (1896); *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *Blumenthal* v. *United States*, 332 U.S. 539 (1947); *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Lutwak* v. *United States*, 344 U.S. 604 (1954); *Delli Paoli* v. *United States*, 352 U.S. 232 (1957); *Schaffer* v. *United States*, 362 U.S. 511 (1960); *Addonizio* v. *United States*, 405 U.S. 936 (1972).

the essential frailty of jury trials and swept away the pernicious "judicial lie" of limiting instructions, which was the handmaiden to injustice through the centuries. The lower court observed that Petitioner's argument is "an indictment on (sic) the jury system itself." That is, of course, too extreme a characterization. All that is intended is the realistic recognition that juries come replete not only with the presumed wisdom of man, but also with his limitations and imperfections, and that the law must, insofar as possible, make allowances for these facts in fitting the human element into any system of justice.

That some realistic constitutional parameters are needed in the conundrum of mass trials is patent. Petitioner's ensnarement is but one example, but his case is *here*, and the facts are of classic dimension. The opportunity needs only to be taken. Contrary to the lower court's opinion, Petitioner does not seek "an indictment on the jury system itself". He asks only an expanded and pragmatic recognition that it is but another imperfect human engine, not magic.

5. Petitioner's Bribery Conviction Was Upheld Only by Approving the Ex Post Facto Application of a Statute Enacted a Year a Half After the Trial Had Been Completed.

Petitioner was sentenced to three years in state prison for his conviction on the substantive bribery indictment, which is a felony in Massachusetts. Mass. G.L. c. 274, §1. A year and a half after his trial, Mass. G.L. c. 274, §2, which provides that an accessory before the fact may be punished as a principal (Massachusetts until then having always recognized that common law distinction), was amended to permit conviction as a principal on evidence

only proving him an accessory.[9] Prior to the amendment, therefore, at the time of Petitioner's trial, it was the law of Massachusetts that one could not be convicted as a principal (Petitioner was so charged) on evidence only proving him to be an accessory. *Commonwealth* v. *Richards,* 1973 Mass. Adv. Sh. 854, 293 N.E. 2d 854; *Commonwealth* v. *French,* 357 Mass. 356, 259 N.E. 2d 195 (1970); *Commonwealth* v. *Doherty,* 353 Mass. 197, 229 N.E. 2d 267 (1968); *Commonwealth* v. *Mannos,* 311 Mass. 94, 40 N.E. 2d 291 (1942); *Commonwealth* v. *Noons,* 1974 Mass. App. Adv. Sh. 326, 308 N.E. 2d 915; *E.g. Commonwealth* v. *DiStasio,* 297 Mass. 347, 356-358, 8 N.E. 2d 923, 929 (1937). Until Petitioner's conviction Massachusetts law maintained another key distinction: one could be convicted of a *misdemeanor* by delegating an agent to act, *Dolan* v. *Commonwealth,* 304 Mass. 325, 23 N.E. 2d 904 (1939); *Commonwealth* v. *Park,* 1 Gray (67 Mass.) 553 (1854), but such delegation in a *felony* could result only in conviction as an accessory, *not* as a principal. *Commonwealth* v. *French, supra; Commonwealth* v. *Doherty, supra.* There was, in effect, no distinction between principals and accessories in misdemeanors in Massachusetts, but there was in felonies.

As there was no evidence of the Petitioner doing or saying anything prior or subsequent to the formation of the alleged bribery conspiracy at the Commodore Hotel meeting in New York, and relying on these principles of Massachusetts law, Petitioner argued to the Massachusetts Supreme Judicial Court that his conviction for the bribery felonies could not stand. That court affirmed, however, saying that the evidence "shows that the defendants specifically delegated to one of the co-conspirators, namely, Barber, the authority to offer a bribe to Hanley. One

[9] Lest the Court think this distinction evanescent, it should be noted that after five years' experience with the statute as amended, it was re-amended in 1973 (Mass. St. 1973, c. 529, §1) so that it once again reads exactly as it did when Petitioner was tried.

may be convicted as a principal where he delegates to an agent the authority to do an act. See *Commonwealth* v. *Dolan,* 304 Mass. 325, 339."[10] The *Dolan* case, however, as noted above, concerned a misdemeanor, and *Commonwealth* v. *Park, supra,* relied on in *Dolan,* makes specific that guilt for the act of an agent applies *only* in misdemeanors. The state court, in relying on *Dolan,* demonstrated that it was, in effect, applying the rule for misdemeanors, then applicable to felonies only by force of the newly amended statute, to Petitioner *ex post facto.* Constitution of the United States of America, Art. I, §§ 9, 10. Counsel at trial and on appeal had no way of anticipating this change, but pointed out the *ex post facto* application of the statute (conceptually, at least; the statute was not cited) to the court in a petition for rehearing (Appendix F hereto). It was denied without opinion (Appendix G hereto).

Petitioner made the same argument to the court below, as there can be no doubt that such a ruling *is* the application of an *ex post facto* law. *Duncan* v. *Missouri,* 152 U.S. 377 (1894); *Calder* v. *Bull,* 3 U.S. (3 Dall.) 386 (1798). The lower court accepted the validity of the *ex post facto* argument in such a circumstance as this,[11] but held that Petitioner's argument "is not one of constitutional dimension" because "it has long been the Massachusetts rule in bribery cases that one who affects a bribe through an agent can be convicted as a principal." Intriguingly, the

[10] *Commonwealth* v. *Beneficial Finance Company, supra,* at 1487. The correct citation to the *Dolan* case, as noted above, is actually *Dolan* v. *Commonwealth.*

[11] In fact, only two years ago, the First Circuit had stricken down as unconstitutional an attempt by the Maine Supreme Court to avoid this Court's holding in *In re Winship,* 397 U.S. 358 (1970), by means of an unprecedented interpretation of Maine law, Senior Circuit Judge Aldrich noting, with his typical Yankee wryness, that while there was "nothing wrong with an end run," "the court went offside" in attempting such an avoidance of the constitutional strictures of this Court. *Wilbur* v. *Mullaney,* 473 F.2d 943, 945 (1st Cir. 1973).

court then cited as authority for that proposition *not* the *Dolan* case, the sole authority erroneously relied upon by the state court, but *Commonwealth* v. *Mannos, supra,* and *Commonwealth* v. *Connolly,* 308 Mass. 481, 33 N.E. 2d 303 (1941), referring to dicta in both opinions. The court thereby fundamentally misread Massachusetts law to avoid the clear constitutional error presented, as neither case is supportive of the proposition, nor, as noted above, is any other Massachusetts authority. In *Connolly,* the defendant's conviction as a principal was affirmed, but he had himself participated in the crimes: he actually directly accepted bribes, taking some personally and having an agent deliver others to him. In *Mannos,* citing *Connolly,* the principal's bribery conviction was affirmed on some indictments as to which the court held that the evidence showed he "personally participated", but convictions were *reversed* on other indictments because he "was not present when payments were made" to the public official by another agent. As to those, the court ruled *he was only an accessory.* The two cases, therefore, reflect exactly the Massachusetts law relied on by Petitioner as requiring his acquittal. They are directly contrary to the proposition for which they were cited by the lower court. That is undoubtedly why those cases were *not* cited by the state court when it constructed its *ex post facto* evasion.

The First Circuit also cited in a footnote *Commonwealth* v. *Benjamin,* 358 Mass. 672, 266 N.E. 2d 662 (1971), for the proposition that the Massachusetts Supreme Judicial Court has held that the application of Mass. G.L. c. 274, §2, as amended, "to acts committed prior to that time does not constitute an *ex post facto* law." Had such a holding been made it would, of course, hardly be entitled to *stare decisis* deference anyway, but *Benjamin* only held that the amended statute applied retroactively to felonies committed *but not tried* prior to the passage of the statute; it did not

go so far as to do what the court did here: apply it to a case in which the trial of the crime was already completed before the enactment of the amendment. Since the change in the statute affected trial evidence—proof of an accessory in a felony now authorized conviction as a principal—it is not unreasonable to so hold, but to try to make that new law applicable to a *completed* trial, as the court did here, is, classically, *ex post facto,* and unconstitutional, and therefore such fundamental error cannot be let stand.

CONCLUSION

For the reasons set forth above a writ of certiorari should issue to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

LYLE S. WOODCOCK,
Petitioner-Appellant,
v.
R. W. AMARAL,
Respondent-Appellee.

Argued Sept. 11, 1974.
Decided Dec. 26, 1974.*

Daniel F. Featherston, Jr., Boston, Mass., with whom Featherston, Homans, Klubock & Griffin, Boston, Mass., was on brief, for appellant.

Michael C. Donahue, Deputy Asst. Atty. Gen., with whom Robert H. Quinn, Atty. Gen., John J. Irwin, Jr., Asst. Atty. Gen., Chief, Crim. Div., and David A. Mills, Asst. Atty. Gen., Chief, Crim. Appellate Section, were on brief, for appellee.

Before COFFIN, Chief Judge, CAMPBELL, Circuit Judge, and MOORE,** Senior Circuit Judge.

MOORE, Senior Circuit Judge.

This is an appeal from a decision of the United States District Court for the District of Massachusetts dismissing appellant's petition for a writ of habeas corpus. The district court's memorandum and order (reported at 373 F. Supp. 644) was based on an agreed record and the parties' briefs and oral arguments.

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* As amended March 4, 1975, after consideration of appellant's petition for rehearing.

** Of the Second Circuit sitting by designation.

The appellant Lyle S. Woodcock was at one time an executive vice president and director of Liberty Loan Corporation, a company in the business of making small loans. In 1964 he was indicted by a Massachusetts special grand jury along with numerous other employees of small loan companies, the companies themselves, and some state officials. The indictment charged conspiracy and bribery of the state officials and resulted in two trials (commonly known as the "small loans cases"). Only the first trial — the so-called "first small loans trial" — is directly at issue in this appeal, although it will be necessary for us to refer occasionally to the "second small loans trial" and the matters at issue therein.

The first small loans trial involved fifteen defendants and a total of forty-eight indictments, three of which named Woodcock. The trial lasted five months and generated a voluminous record, and Woodcock, along with most of his codefendants, was found guilty of conspiracy and bribery.

Appeals from the convictions were deferred until after the second small loans trial, which concerned an unrelated bribery scheme and in which Woodcock received a directed verdict of acquittal. Eventually appeals from the two trials were consolidated and heard by the Supreme Judicial Court of Massachusetts, which affirmed the convictions in one of the longest opinions in that court's history. Commonwealth v. Beneficial Finance Company, 1971 Mass. Adv. Sheets, 1367, 275 N.E.2d 33 (1971). The Supreme Court denied certiorari, 407 U.S. 914, 92 S.Ct. 2433, 32 L.Ed.2d 689, and Woodcock's petition for a writ of habeas corpus followed.

The object of the conspiracy and bribery involved in the first trial was to insure that the Massachusetts Rate Board, which regulated the interest rates on small loans, did not lower the premissible rate. One Martin J. Hanley was the Deputy Commissioner of Banks in Massachusetts and the supervisor of the small loans industry. It was his job to

present information pertinent to interest rates to the Rate Board at hearings beginning in November 1962. The agreement to bribe Hanley and through him at least some of the members of the Rate Board was made at a meeting held in October 1962, at the Commodore Hotel in New York City.[1] Woodcock was present along with officials of other small loan companies, including one William Heath, a public relations executive with American Investment Co. Heath was to become the prosecution's star witness at trial, and without his testimony the government concedes that Woodcock could not have been convicted.

At trial, Heath recounted the proceedings at the Commodore Hotel meeting. First there was a discussion concerning whether to have a "program" to bribe the Rate Board and then the size of the sum necessary to effectuate the bribe was considered. One participant, Frank Glynn, estimated that between $50,000 and $75,000 would be required. Woodcock responded that this figure was ridiculously high and that his company would have nothing to do with a program of that size. Heath then opined that $25,000 would probably be adequate, and, according to Heath, Woodcock replied:

> "At the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised under any conditions."

The parties have stipulated that this testimony was crucial to Woodcock's conviction.

Woodcock urges reversal of the district court's dismissal of his petition on several grounds. All of his arguments

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[1] It is stipulated that the meeting was first called for legitimate purposes—to discuss the possible formation of an industry trade association and the preparation of statistics for presentation to the Rate Board.

have been considered by the trial court (either in motions made at various stages during the trial or in the defendants' subsequent motions for a new trial), the Supreme Judicial Court of Massachusetts, and the district court. His contentions will be discussed in the order in which he raises them in his brief.

I. The *Brady* Issues

[1] The first group of arguments raised by the appellant relates to the prosecutor's duty to disclose evidence materially favorable to the accused. See Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Woodcock cites three instances in which the favorable evidence was not disclosed and one in which the evidence, though disclosed, was allegedly the subject of a prosecutorial misrepresentation which induced Woodcock's attorney to refrain from bringing up the evidence at trial. To prevail under *Brady,* of course, the appellant must show not only that favorable evidence was not disclosed but also that the evidence was material to the issues of guilt or punishment. *E.g.,* Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[2] During the first small loans trial, Woodcock's attorney was given portions of Heath's grand jury testimony which showed that at the same Commodore Hotel meeting at which Woodcock allegedly entered into an agreement to bribe the Rate Board, he had also angrily refused to pay Hanley on another matter, the so-called Hanley program, which was the subject of the second small loans trial. However, the prosecutor, Mr. Travers, warned Woodcock's trial counsel that to cross-examine Heath on this refusal might well introduce criminal matters which, although not related to the allegations at issue in the first small loans trial, would nonetheless be prejudicial to Woodcock.[2] Evi-

[2] Joint Appendix 520.

dence about Woodcock's refusal to participate in the Hanley program would presumably have undercut the testimony that he agreed to bribe the Rate Board. For the jury to convict him of participating in the Rate Board conspiracy, Woodcock argues, it would have had to believe that he argued to a bribe at one moment and then shortly thereafter, at the same meeting, emphatically disapproved of another bribe.[3] But having been deterred by the prosecutor's warning and thinking that questioning would bring out incriminating evidence pertaining to the Hanley program (for which the appellant was then under indictment), counsel did not cross-examine Heath about Woodcock's angry refusal to pay. Later, at the second small loans trial, when Heath did in fact finally testify concerning Woodcock's refusal to participate in the Hanley program, no other evidence in any way incriminating to Woodcock was disclosed, and he received a directed verdict of acquittal. Naturally, this development caused Woodcock's lawyer to wish that he had examined Heath about the refusal at the first trial and to think that he had been misled by the prosecutor's warning.

[3] The appellant contends that the prosecutor's warning was not made in good faith, but rather was a device to prevent injection of evidence about the Hanley program into the first trial. Such testimony, Woodcock argues, would inevitably have brought to light the involvement of his codefendants in this wholly separate conspiracy,

[3] Although we are willing to assume that the appellant would have gained some benefit from this evidence, we note that Woodcock's refusal to participate in the Hanley program is not necessarily inconsistent with his participation in the Rate Board program. Woodcock had shown considerable reluctance to go ahead with the latter scheme and had agreed only after setting a maximum dollar figure. Thus, it is not unusual that he refused when later asked to contribute more money.

and the resulting prejudicial effect would have prompted them to move for a mistrial. This, of course, the prosecutor wanted to avoid. Were we to accept the contention that the prosecution deliberately undercut the value of a disclosure made pursuant to *Brady* with a false warning, there would be little doubt that a new trial would be required. If nondisclosure of *Brady* material is occasioned by prosecutorial misconduct, prophylactic considerations assume overriding importance. Accordingly, as decisions in other circuits have recognized,[4] a much-reduced showing of materiality is required for a defendant so victimized to obtain a new trial. We have no doubt that this evidence would clear that small hurdle. In this case, however, there is every indication that the warning was made in good faith. At the hearing on the motions for a new trial made by the various defendants, the prosecutor, Mr. Travers, testified extensively. He explained that based on his knowledge of the evidence, he had thought when he gave the warning (and still thought at the time of the hearing) that an inquiry into Woodcock's refusal to contribute to the Hanley program would bring out evidence of still another conspiracy involving bribery of public officials in Massachusetts, the so-called legislative program.[5] After hearing this testimony, the trial court explicitly ruled that the prosecutor had made "a perfectly correct, proper, and

[4] *E.g.*, Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974); United States v. Pfingst, 490 F.2d 262 (2d Cir. 1973), cert. denied, 414 U.S. 919, 94 S.Ct. 2625, 41 L.Ed.2d 224 (1974); Evans v. Janing, 489 F.2d 470 (8th Cir. 1973); Ross v. Texas, 474 F.2d 1150 (5th Cir.), cert. denied, 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98 (1973); Clarke v. Burke, 440 F.2d 853 (7th Cir. 1971), cert. denied, 404 U.S. 1039, 92 S.Ct. 718, 30 L.Ed.2d 731 (1972); Rhinehart v. Rhay, 440 F.2d 718 (9th Cir.), cert. denied, 404 U.S. 825, 92 S.Ct. 53, 30 L.Ed.2d 53 (1971). This Circuit has hinted at the adoption of a presumption of prejudice in cases involving prosecutorial behavior. United States v. Donatelli, 484 F.2d 505, 508 n. 2 (1st Cir. 1973).

[5] Joint Appendix 521.

truthful statement under all of the circumstances."[6] There is ample evidence to support this ruling, and we are not willing to dispute it at this stage.[7]

It is unfortunate that defense counsel may have changed his trial tactics based on a warning which ultimately proved to be unwarranted. But there was full opportunity for counsel to explore the meaning of the warning more fully, and absent deliberate prosecutorial misconduct we see no basis for reversal on this ground.

[4] The appellant's remaining *Brady* contentions are directed at three alleged failures of the prosecution to make constitutionally mandated disclosures of exculpatory evidence. Woodcock first argues that expense vouchers submitted by Heath to his employer were wrongfully withheld since they would have provided a basis for impeaching Heath's credibility. The circumstances were these. During the first trial Heath testified that "within a week or one or two days" before the crucial meeting at the Commodore Hotel, he had met with James Pratt and Francis Glynn, public relations men for other loan companies, at Purcell's Restaurant in Boston, where the Rate Board program was first discussed.[8] In January, 1964, the prosecution received from the Massachusetts Crime Commission a massive collection of documents relating to the Commission's investigation of the small-loans industry. Among those documents were Heath's expense vouchers covering a four-year period which showed that during the two weeks preceding October 17, 1962, the date of the Commodore Hotel meeting, Heath

[6] *Id.* 235.

[7] An examination of Heath's grand jury testimony shows some link between the legislative program and Woodcock's refusal to contribute to the Hanley program and lends credence to Mr. Travers' explanation for his warning. *See* Joint Appendix 262-65. Moreover, Travers testified that his warning was based on more than merely Heath's grand jury testimony. Joint Appendix 522.

[8] Testimony about the meeting at Purcell's was not admitted against Woodcock.

had recorded lunches with others than Glynn and Pratt on every working day during which he was in Boston. Woodcock contends that, possessed of these vouchers, he would have been able to show that Heath either lied about when the meeting took place, lied about its having taken place at all, or submitted falsified expense vouchers, thus generally impeaching the credibility of a witness whose testimony was admittedly crucial to his conviction.[9]

Appellant labels the failure to make the vouchers available to the defense before the first trial "deliberate". The Commonwealth concedes that it was "conscious". We have scrutinized the testimony presented at the hearing on the new trial motions of appellant and several of his codefendants. The prosecutor testified that immediately prior to the first trial he and an assistant undertook on a crash basis to review all of Heath's grand jury testimony and related documents in order to furnish to the defendants "anything that reflected in any way on the testimony that Heath was to give . . . ." While he was aware of the existence of the vouchers, the prosecutor testified, he did not intend to make reference to them at trial, and did not consider them pertinent to any evidence that would be offered at trial. The failure to make the vouchers available to the defense was "deliberate" in the sense that it was the result of a conscious decision, rather than inadvertence, but there is nothing in the record from which we would infer that the prosecutor was aware before the first trial that the vouchers might have any value to the defense. It seems entirely credible to us that, at least at that time, that a prosecutor, rejecting the positive worth of the vouchers as evidence to buttress his own case, might overlook their value to defense counsel in demonstrating that a witness,

[9] Evidence affecting the credibility of an important witness falls within the disclosure obligation of the prosecution. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

who had testified on another issue against his client, might be impeached on a collateral statement about having lunch within a certain period with certain people.

Educated by events at the trial, and by appellant's arguments — refined in the course of the new trial hearing, an appeal to the Supreme Judicial Court of Massachusetts, and the present litigation — we can see that the vouchers would have been of some use to appellant at the first trial. We think they should have been furnished to appellant before trial, but we do not think that the failure to do so, in the context we have set forth, when the disclosure by the Commonwealth was deemed by the presiding justice "probably the most full and complete disclosure ever made in a trial of a criminal case in this Court",[10] and when the useful items were but a few of four years' worth of vouchers, requires a new trial. Other courts have adopted a variety of standards for the determination whether the prosecution's failure to disclose exculpatory evidence after a general request from the defense requires a new trial.[11]

[10] Quoted by the Supreme Judicial Court, Commonwealth v. Beneficial Finance, *supra*, 1971 Mass.Adv. Sheets at 1481, 275 N.E.2d 33.

[11] The Second Circuit in a pertinent series of decisions has evolved a variable standard which decreases the level of "materiality" required for a new trial as the culpability of the prosecution in failing to disclose increases. Where the prosecution is simply negligent the test is whether "there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." Grant v. Alldredge, 498 F.2d 376, 380 (2d Cir. 1974), *quoting* United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969). Presumably this standard would also apply to "[f]ailure to appreciate the use to which the defense could place evidence in the prosecution's hands." United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968). As the culpability of the prosecutor "increases from unavoidable . . . to negligent nondisclosure to deliberate suppression, 'prophylactic considerations' " become more compelling and eventually paramount. United States v. Pfingst, 490 F.2d 262, 277 (2d Cir. 1973), cert. denied, 417 U.S. 919, 94 S.Ct. 2625, 41 L.Ed.2d 224 (1974); Grant v. Alldredge, *supra* at 381 of 498 F.2d. *See also* Levin v. Katzenbach, 124 U.S.App.D.C. 158, 363

We conclude that the failure to disclose in this case was an innocent miscalculation of utility of the evidence to the defense. We do not reach the question whether a different standard would apply to a more serious failure to disclose. We simply hold that a new trial is not required in this case because we cannot say that had the evidence been disclosed its use would have created a reasonable possibility of a different result.

It must be borne in mind that Heath's testimony that he lunched with Pratt and Glynn at Purcell's Restaurant shortly before the Commodore Hotel meeting had nothing to do with appellant. The impeachment possibility lay in showing that on nine or ten working days during the two weeks preceding the Commodore Hotel meeting Heath sought reimbursement for lunches with others than Pratt and Glynn. Would this have made a difference? We take into consideration the following factors. Heath's testimony was voluminous, he being the key witness in the whole trial. It is speculative at best that even if proven false in one detail, he would be discredited across the board. This factor takes on strength when we consider the likely response that, since Heath had testified he had orders not to pay for meals of other industry public relations personnel — which Pratt and Glynn were —, the meeting might have taken place in addition to the reported lunches, as Heath occasionally had more than one lunch session in a given

F.2d 287 (1966); Ross v. Texas, 474 F.2d 1150 (5th Cir. 1973), cert. denied, 414 U.S. 850, 94 S.Ct. 141, 38 L.Ed.2d 98 (1973).

The commentary to the section of the A.B.A. Standards Relating to Discovery and Procedure Before Trial requiring disclosure of exculpatory material notes that the initial determination of what evidence to disclose always rests with the prosecutor and must be made in "light of his sense of justice", and that "it may be expected that generally prosecuting attorneys will become accustomed to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it." A.B.A. Standards, Discovery and Procedure Before Trial, at 74-75, *approved* 1970.

day; or that a reported lunch was merely one for which he had paid the bill, as sometimes happened. We also take into consideration the influence of the nondisclosure on appellant's ability to prepare fully for trial. Unlike the situation in Grant v. Alldredge, 498 F.2d 376 (2d Cir. 1974), no avenues of possibly fruitful exploration were foreclosed. Appellant lost the opportunity to exploit the lunch schedule reported in the vouchers — but no more.

We cannot know what was on the minds of the jurors, nor can we say how cross-examination of Heath based on the vouchers would have affected them, but the impact of the vouchers upon us is not great, and, as we have no other means by which to estimate what their impact would have been on the jury, we conclude that failure to disclose the vouchers did not sufficiently prejudice appellant to warrant a new trial.

[5] The appellant's remaining objections concern the nondislosure of portions of Heath's grand jury testimony. In his last appearance before the grand jury, in December 1965, Heath did not name Woodcock as being present at the 1962 Commodore Hotel meeting, although in previous testimony Heath had specifically identified Woodcock as a participant. The appellant contends that this apparent inconsistency should have been disclosed. The appropriate answer to this argument, however, was given by the trial court in denying the motions for new trials:

> "Neither the defendants nor this court can expect that on every date and on every page of the transcript . . . the witness will give and repeat the aggregate of all his testimony on any particular issue, event, occurrence, or case." [12]

To require a witness to summarize his prior testimony, with the attendant risk that an omission could be construed

[12] Joint Appendix 233.

as an inconsistency, would create an intolerable burden on judicial proceedings. Heath's omission in his last grand jury appearance is hardly exculpatory at all, much less material.

[6] The final portion of Heath's grand jury testimony which appellant contends was wrongfully not disclosed contains a statement by Heath in which he recounted a 1957 conversation with Woodcock which he regarded as an effort by Woodcock to blackmail him. Although any motive a witness might have to distort the truth may at times be extremely important, *cf.* Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), in this instance the testimony about the supposed blackmail attempt, and hence the failure to disclose it, appear to have little significance. The appellant would characterize Heath as having "brooded" for seven years about an attempted blackmail but in fact the trial court found that there was much evidence of friendship between Heath and Woodcock (Appendix 232). Under these circumstances, the unintentional nondisclosure of this evidence cannot be deemed the basis for a new trial.

In summary, we find nothing in Woodcock's *Brady* contentions that requires reversal. Nor do his contentions, which are all without individual merit, gain any strength when viewed collectively.

II. Sufficiency of the Indictment

[7] During his first trial Woodcock was furnished with a transcript of the relevant grand jury testimony against him. One day thereafter [13] he sought to dismiss the indictment on grounds of insufficient evidence. The trial judge

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[13] Woodcock's "Motion for Leave to File Motion to Dismiss" and accompanying "Motion to Dismiss" were filed on September 27, 1966. The trial began on August 9, 1966.

dismissed his motions as untimely, and the Supreme Judicial Court of Massachusetts ruled that this action was not an abuse of discretion.[14] Woodcock now maintains that it is a denial of both due process and equal protection to permit the return of an indictment on insufficient evidence. The district court did not consider whether the evidence was in fact insufficient, since it ruled that the claim was not one of constitutional proportion. 375 F. Supp. at 646.

We agree with the conclusion of the district court. In Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), the Supreme Court stated:

> "If indictments were to be held open to challenge on the ground that there was *inadequate* or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

Id. at 363, 76 S.Ct. at 408 (footnote omitted; emphasis added). This language was partially repeated in Lawn v. United States, 355 U.S. 339, 349-50, 78 S.Ct. 311, 2 L.Ed2d 321 (1958), and more recently in United States v. Calandra, 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Since all of these cases involved the *character* of the evi-

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[14] The Supreme Judicial Court of Massachusetts stated, *inter alia:*

> Return of an indictment on insufficient evidence is not an error of constitutional dimension such as to compel a judge to consider an untimely motion.

1971 Mass.Adv.Sheets at 1397, 275 N.E.2d at 58-59.

dence upon which a grand jury can base an indictment [15] rather than the *quantum* of evidence before the grand jury, the appellant would dismiss the use of "inadequate" by the Supreme Court in the above-quoted passage as "unfortunate dictum." We cannot accept this assessment. The Court in *Costello* expressly refused to adopt a rule permitting defendants to challenge indictments on grounds of inadequate or incompetent evidence. In the Court's view such a rule "would result in interminable delay but add nothing to the assurance of a fair trial." 350 U.S. at 364, 76 S.Ct. at 409. Both the Court's language and the policy reasons [16] underlying its decision militate against construing those portions of *Costello* which the appellant finds objectionable as mere dictum. That task is for the Supreme Court, should it ever be so inclined.

Since Woodcok's challenge of the indictment does not raise a constitutional issue, we need not consider the merits of his claim.

III. Severance

At several points throughout the first small loans trial, Woodcock moved to sever his case from those of his codefendants. The judge denied these motions, and the Supreme Judicial Court of Massachusetts ruled that these denials were not an abuse of discretion. 1971 Mass. Adv. Sheets at 1388-91, 275 N.E.2d at 53-55. The appellant now argues that to try him in a "mass trial" involving 14 other defendants and 48 indictments, 45 of which did not even

[15] The issue in *Costello* was whether an indictment can be based solely on hearsay evidence. *Lawn* concerned evidence allegedly obtained in violation of the Fifth Amendment, and *Calandra* dealt with evidence seized in violation of the Fourth Amendment.

[16] In *Calandra* the Court also stressed the importance of orderly grand jury proceedings, uninterrupted by tangential litigation such as motions to suppress. 414 U.S. at 349-50, 94 S.Ct. 613, 38 L.Ed.2d 561. This would normally not be a problem when only the adequacy of the evidence is at issue.

name him, constituted a denial of due process of law. He stresses in particular the large volume of evidence, most of which neither directly involved the appellant nor was admitted against him, and the necessary complexity of the trial judge's instructions to the jury outlining the limitations on the evidence. Quoting Coleridge, the appellant states that to expect the jury to absorb and categorize all this material would require "a willing suspension of disbelief."

As an integral part of this argument, Woodcock complains of the admission of hearsay statements of his coconspirators which, although not directly implicating him, nevertheless tended to show the existence of a conspiracy and to prove the substantive bribery offense. By and large, the appellant does not stress particular instances of prejudice,[17] but adverting to the confrontation clause of the sixth amendment and noting his inability to cross-examine his codefendants,[18] he condemns the admissions in general terms as overly prejudicial.

[17] Woodcock does stress one instance in which he contends that bing tried jointly deprived him of an important piece of evidence. On cross-examination Heath was asked what amount of money he was told by his employer, American Investment Co., that it had contributed to the Rate Board program. The purpose of this inquiry was to show that the contributions of American and two other corporate defendants (Household and Beneficial) alone totalled $25,000, and therefore that Liberty could not have participated. The Commonwealth did not object, but other defendants did on the ground that the question called for hearsay. Woodcock argues that since the Commonwealth did not object, he would have had the benefit of this testimony had he been tried alone. However, the Commonwealth's failure to object may well have been based on the fact that the testimony tended to *inculpate* other defendants as well as exculpate Woodcock. Whether the Commonwealth would have followed the same tactic in an individual trial is purely conjectural.

[18] Woodcock's inability to call his codefendants to the stand is cited as one reason why the trial should have been severed. However, even if Woodcock had been tried separately, there is no indication that his codefendants would have waived their fifth amendment privilege against self incrimination to testify on his behalf. Moreover, there is no indication that the testimony of any of his codefendants

[8, 9] The concern voiced by Woodcock is of course by no means novel. Both the United States Supreme Court [19] and this Circuit [20] have been among those who have acknowledged the danger that in reaching a verdict with respect to any individual defendant, a jury might, consciously or unconsciously, consider evidence that was admitted only against his codefendants. When the case against his codefendants is overwhelming, the relatively minor actor runs a risk of being found guilty by association. Proper rulings on the admissibility of evidence and lucid limiting instructions to the jury cannot entirely eliminate the danger of prejudice; they can, however, reduce it to acceptable proportions. For against the prejudice encountered by an individual defendant must be balanced the legitimate governmental interest in having a joint trial — chiefly, the avoidance of the cost and docket congestion engendered by a multiplicity of trials.[21] And it is with this balance in mind that the appellant's claim of a denial of due process must be assessed. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[10] We do not think that the complexity of the trial made it so fundamentally unfair as to deny the appellant his constitutional rights. Quite apart from any evidence

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would have exculpated Woodcock. Thus, any advantage which might have been gained by severance seems more theoretical than real. *See* United States v. Leonard, 161 U.S.App.D.C. 36, 494 F.2d 955, 970 (1974), citing Gorin v. United States, 313 F.2d 641, 645-46 (1st Cir.), cert. denied, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052 (1963).

[19] Krulewitch v. United States, 336 U.S. 440, 445, 69 S.Ct. 716, 93 L.Ed. 790 (1949) (Jackson, J., concurring); Blumenthal v. United States, 332 U.S. 539, 559, 68 S.Ct. 248, 92 L.Ed. 154 (1947).

[20] Gorin v. United States, 313 F.2d 641, 646 (1st Cir.), cert. denied, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052 (1963).

[21] In addition, there is the added possibility that minor actors would not be tried at all were it not for the vehicle of a joint trial. *See* United States v. Cohen, 145 F.2d 82, 95-96 (2d Cir. 1944), cert. denied, 323 U.S. 799, 65 S.Ct. 553, 89 L.Ed. 637 (1945).

of the acts and declarations of his coconspirators which may have been admitted against Woodcock, there was, as he concedes, direct testimony by Heath that at the Commodore Hotel meeting Woodcock joined the conspiracy and in fact set the maximum figure of $25,000. The jury, with the aid of the judge's instructions and the summations of the various attorneys was certainly capable of considering this evidence. And we cannot assume that the jury was so irresponsible that it did not assess the case against each defendant independently and with full consideration of the evidence which directly implicated that individual. With respect to Woodcock, therefore, the jury must have considered Heath's testimony about the October 1962 meeting. Heath's credibility and the accuracy of the statement which he attributed to Woodcock were proper jury questions, and they were evidently resolved against the appellant.

To charge that the jury would convict the appellant solely on the basis of evidence which did not directly implicate him is an indictment on the jury system itself. But "not guilty" verdicts returned by the jury with respect to some of the charges against defendants Hanley and Garfinkle belie any contention that the jury reached its decision without carefully sifting the evidence. The quantity of incriminating evidence against Woodcock was small; his name did not recur throughout the testimony, constantly interwoven with allegations against his various codefendants. Thus, it would seem to have been a relatively simple task for the jury to focus on Woodcock without becoming confused about which evidence applied to whom. Whether the jury was able to follow the limiting instructions of the judge with the precision of a computer is not the relevant inquiry. It is rather whether the appellant received a fundamentally fair trial in light of the legitimate interests of the Commonwealth in trying him jointly with

his coconspirators. In this connection we see nothing in the evidence, the number of defendants, or the rulings of the trial judge which would warrant a conclusion that the sheer complexity of this trial prevented the jury from appraising the independent evidence against the appellant and meting out individual justice under the law. *See* United States v. Stromberg, 268 F.2d 256, 264 (2d Cir.), cert. denied sub nom. Lessa v. United States, 361 U.S. 863, 80 S.Ct. 119, 4 L.Ed.2d 102 (1959).

The appellant's reliance on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), is misplaced. *Bruton* held that, notwithstanding the giving of limiting instructions, a defendant's Sixth Amendment right to confrontation was violated by the introduction of the confession of a codefendant who did not take the stand. The Supreme Court based its decision primarily on the realization that in some instances the risk that the jury will not follow limiting instructions is overwhelming. And that was so in the context of *Bruton* where the statements of the codefendant were not only "powerfully incriminating" but also inherently unreliable. 391 U.S. at 135-36, 88 S.Ct. 1620, 20 L.Ed.2d 476. However, as this court has already noted, United States v. Clayton, 450 F.2d 16 (1st Cir. 1971), cert. denied, 405 U.S. 975, 92 S.Ct. 1200, 31 L.Ed.2d 250 (1972), *Bruton* expressly did not deal with a situation where statements were admissible under a recognized exception to the hearsay rule. 391 U.S. at 128 n. 3, 88 S.Ct. 1620, 20 L.Ed.2d 476; *see* Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). And in any event, the situation here is in no way analogous to *Bruton*, since the appellant nowhere complains of a statement so incriminating that it would be a totally unrealistic test of the jury system to expect the jury to ignore it.

IV. The Mode of Prosecution

[11] Woodcock argues that the manner in which he was prosecuted violated the equal protection clause of the fourteenth amendment. In essence, he complains that too many guns were brought to bear on him and his coconspirators. In particular, he objects to the extensive role played by agents of the Massachusetts Crime Commission, a special commission created by the legislature in 1962 "to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practices in government at state and local levels . . . ." Resolves 1962, c. 146.

[12] We need not tarry long on this question. Both the trial court and the Supreme Judicial Court of Massachusetts found that the participation of the Commission neither offended any provisions of state law nor violated the federal constitution. Of course, in this habeas corpus action, only the latter question is of concern to this court, and we feel that no valid constitutional claim is presented. A state can, and indeed must, proceed against large and complex criminal schemes more forcefully than against small criminals. As long as there is a rational purpose behind the state's decision on the manner of prosecution, no constitutional infirmity exists. *Cf.* Johnson v. Louisiana, 406 U.S. 356, 363-65, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972). That such a rational purpose was present in this case is plain. Corruption in government strikes at the heart of the democratic process and is among the most invidious of all crimes. For the legislature of Massachusetts to conclude that special measures were necessary to attack it is eminently justifiable. Moreover, the complexity of the proceedings in the "small loans cases" is witness to the extensive nature of the criminality, and therefore, the necessity of utilizing a considerable amount of resources to uproot it is quite understandable.

V. Alleged Application of an Ex Post Facto Law

As his final contention, Woodcock asserts that with respect to his conviction for bribery, he has been the victim of the application of an ex post facto law.[22] The statute about which he complains, as amended in 1968, provided:

> "Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring, or otherwise procuring such felony to be committed shall be *indicted, tried* and punished as a principal."

Ann. Laws of Mass., C. 274 § 2 (emphasis added). Before 1968,[23] that is, at the time of the offense and the trial, the same statute read:

> "Whoever aids in the commission of a felony, or is an accessory thereto before the fact . . . shall be punished in the manner provided for the punishment of the principal felon."

Thus, the significant language added in 1968 was "indicted, tried." The apparent aim of the amendment was to cure an artificial variance problem which permitted an accused to avoid conviction altogether when an indictment named him as a principal but the evidence showed him to be only an accessory before the fact. *See* Commonwealth v. Benjamin, 358 Mass. 672, 266 N.E.2d 662, 668 (1971).

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[22] The Supreme Court has defined an *ex post facto* law as

> one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required or, in short, in relation to the offense or its consequences, alters a situation of a party to his disadvantage.

Duncan v. Missouri, 152 U.S. 377, 382, 14 S.Ct. 570, 572, 38 L.Ed. 485 (1894); *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798).

[23] A subsequent amendment in 1973 returned the statute back to its pre-1968 wording.

In brief, the evidence pertaining to the bribery was that Woodcock and the other defendants acted through an agent by delegating to Nathaniel Barber, one of the co-conspirators, the authority to offer the bribe to Hanley. *See* 1971 Mass. Adv. Sheets at 1405-07, 1487, 275 N.E.2d at 64, 110. Woodcock argues that prior to the 1968 amendment to C. 274 § 2, this evidence made him at most an accessory before the fact. In affirming his conviction as a principal, therefore, he contends that in conceptual terms (though not expressly), the Supreme Judicial Court of Massachusetts applied the 1968 amendment to his case.[24]

[13] The fundamental difficulty with this argument is that it has apparently long been the Massachusetts rule in bribery cases that one who effects a bribe through an agent can be convicted as a principal. *See* Commonwealth v. Mannos, 311 Mass. 94, 108, 40 N.E.2d 291, 299 (1942); Commonwealth v. Connolly, 308 Mass. 481, 489-90, 33 N.E. 2d 303, 308-09 (1941).[25] Thus, the Supreme Judicial Court of Massachusetts in no way applied a new principle of law to the appellant's case, and we have no occasion to consider whether it would have constituted an *ex post facto* law if the Court had done so.[26] In truth, it appears that Woodcock's objection is not one of constitutional dimension but rather relates to the sufficiency of the evidence to convict him of bribery, an issue which the state courts have answered adversely to him.

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[24] The appellant concedes that in misdemeanor cases acting through agents is sufficient to sustain conviction as a principal. Dolan v. Commonwealth, 304 Mass. 325, 23 N.E.2d 904 (1939).

[25] Although *Mannos* and *Connolly* involved requesting or accepting bribes, we see no basis for concluding that the rule should be any different when the crime involves offering or giving a bribe.

[26] We note in passing that the Supreme Judicial Court of Massachusetts has ruled that application of C. 274 § 2, as amended in 1968, to acts committed prior to that time does not constitute an *ex post facto* law. Commonwealth v. Benjamin, 358 Mass. 672, 266 N.E.2d 662 (1971).

VI. Conclusion

Having considered all the points raised by the appellant we find no basis for distributing the holding of the court below. Accordingly, the decision of the district court is:

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MEMORANDUM and ORDER
April 1, 1974

CAFFREY, CH.J.

This matter came before the Court on the basis of petitioner's objections to a Memorandum, Findings and Recommendation filed by the United States Magistrate. The case stems from an amended petition for a writ of habeas corpus filed by petitioner who was indicted, along with other employees of the so-called "Small Loan" companies, on May 8, 1964, in the Superior Court, Suffolk County, Commonwealth of Massachusetts. Petitioner was named as a party-defendant in three indictments and after a five-month trial he was found guilty, on December 18, 1966, on all three counts. On November 4, 1971, petitioner's conviction was affirmed by the Massachusetts Supreme Judicial Court, whose opinion appears at Mass. Adv. Sh., 1971, p. 1367. On June 12, 1972, the United States Supreme Court denied petitioner's application for a writ of certiorari, 407 U.S. 914.

The amended petition was referred to a Magistrate who filed a 23-page document captioned "Memorandum, Findings and Recommendations on Respondent's Motion to Dismiss." The Magistrate made a recommendation to this Court that respondent's motion to dismiss be allowed. Thereafter, this Court received memoranda of law from both parties with reference to the Magistrate's recommendation, subsequent to which counsel orally argued the matter in this court.

At the oral argument, counsel for petitioner concentrated his argument on four of the seven constitutional issues which petitioner seeks to raise in the amended petition for writ of habeas corpus. Petitioner's allegations will be discussed in the order listed by counsel for petitioner at oral argument.

1. PETITIONER'S CLAIM "AS THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO THE GRAND JURY, IT WAS CONSTITUTIONALLY IMPERMISSIBLE FOR THEM TO INDICT THIS PETITIONER."

This contention was disposed of adversely to the petitioner at pp. 1396-97 of the opinion of the Supreme Judicial Court. A number of Supreme Court decisions have established that it is not necessary for this court to consider the merits of this claim by petitioner because the claim is not one of constitutional proportion. See *United States* v. *Calandra*, 42 U.S.L.W. 4104 (Jan. 8, 1974), in which the Supreme Court ruled that the Fourth Amendment's exclusionary rule is not applicable to grand jury proceedings. The Supreme Court also observed (at p. 4106):

> "Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, *Costello* v. *United States, supra; Holt* v. *United States*, 218 U.S. 245 (1910), or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, *United States* v. *Lawn*, 355 U.S. 339 (1958)."

To the same effect see *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Blue*, 384 U.S. 251, 255, n. 3 (1966). *Russell* v. *United States*, 369 U.S. 749 (1962) relied on by petitioner, is wide of the mark. That case involved an indictment which was not valid on its face and which did not identify the offense charged with

adequate specificity. Likewise, *Connor* v. *Picard*, 434 F.2d 673 (1 Cir. 1970), also cited by petitioner, is even more remote, dealing as it does, with the lack of specificity in "John Doe" warrants. I rule there is no constitutional merit in petitioner's contention relative to allegedly insufficient evidence being submitted to the Suffolk County grand jury in his case.

2. PETITIONER CLAIMS "THE PROSECUTOR'S SUPPRESSION OF EXCULPATORY EVIDENCE WORKED A DENIAL OF DUE PROCESS OF LAW."

This contention concerns a claim that counsel for petitioner was given certain portions of the grand jury testimony of one Heath, the principal witness against petitioner, together with advice from the prosecutor that if Heath were cross-examined as to certain apparently exculpatory portions of his grand jury testimony, such cross-examination would result in bringing out other evidence of criminality. Petitioner claims that this advice or warning from the prosecutor was, in fact, a misrepresentation which had the effect of a "suppression of the evidence." This contention was dealt with by the Supreme Judicial Court adversely to petitioner on pp. 1480-87 of its opinion. Petitioner concedes that to come within the ruling of the Supreme Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963), the suppressed evidence must be both exculpatory and material. The Supreme Judicial Court ruled in substance that the allegedly suppressed evidence was not material.

The record of this case shows that no evidence was, in fact, "suppressed." The evidence was made available to petitioner's counsel with the admonition that its use might develop other evidence adverse to the interests of petitioner. The record contains an adequate explanation by the prosecutor of just what he had in mind in advising

petitioner's counsel of the possible consequences of the use of this evidence. The fact that counsel for petitioner erroneously understood which criminal conduct was being adverted to by the District Attorney does not bring this case within the rule of *Brady* v. *Maryland*. The District Attorney cannot be saddled with responsibility for misinterpretation of his warning by counsel for petitioner. To the extent that there was ambiguity in the statement of the prosecutor it certainly could have been cleared up by additional questioning on the part of petitioner's counsel.

Petitioner's complaint relative to the non-production of certain vouchers appears to be a post-trial fishing expedition, which the Supreme Court specifically warned against in *Giglio* v. *United States*, 405 U.S. 150, 154 (1972). These vouchers were characterized by the trial judge as not being so material that they created a reasonable likelihood that their production would have changed the jury's verdict. This ruling was approved, and properly so, by the Supreme Judicial Court at p. 1481 of its opinion.

3. PETITIONER CLAIMS "PETITIONER'S BRIBERY CONVICTION WAS ONLY AFFIRMED BY THE ILLEGAL APPLICATION *ex post facto* OF A STATUTE ENACTED MORE THAN A YEAR AFTER THE TRIAL."

This contention likewise was considered by the Supreme Judicial Court and decided adversely to petitioner at p. 1487 of its opinion. Petitioner claims that in upholding his conviction the court was, in effect, making an *ex post facto* application of Mass. G.L. c. 274, §2, as amended. This statute was enacted in 1968 after the completion of petitioner's trial. An examination of the record establishes that this claim is devoid of merit. The opinion of the Supreme Judicial Court made no reference, directly or indirectly, to the 1968 statute. The opinion made it abundantly clear that petitioner's conviction was affirmed on

the basis of common law principles of agency. The opinion noted, at p. 1487,

> "One may be convicted as a principal where he delegates to an agent the authority to do the act. See *Commonwealth* v. *Dolan*, 304 Mass. 325, 339."

I rule there is no validity to petitioner's contention that he has been victimized by an *ex post facto* application of the state statute.

4. PETITIONER'S FOURTH CLAIM IS THAT "THERE WAS NO EVIDENCE ADMITTED AGAINST HIM THAT WOULD SHOW THAT ANY OTHER PERSON AT THE NEW YORK MEETING HAD AUTHORITY TO ENTER INTO THE CONSPIRACIES ALLEGED IN INDICTMENTS NUMBERED 11,900 AND 11,910 AND, THEREFORE, THERE WAS NO ONE ELSE WITH WHOM HE COULD CONSPIRE."

The contention is unsupported by any relevant decision and ignores the basic nature of a conspiracy, the gist of which is an agreement or understanding between the co-conspirators to accomplish an illegal purpose. Conspiracy has been made a crime in order to protect society from the enhanced dangers inherent in joint or concerted action by two or more persons seeking to accomplish an illegal purpose. The success of the conspiracy or the commission of the substantive crime is immaterial to the proof of a criminal conspiracy. *Scales* v. *United States*, 367 U.S. 293 (1961). While the commission of the substantive offense which was the object of the conspiracy charged may have been subject to the approval of the corporate employers of those shown to be conspirators, no corporate blessing was required or needed as part of the illegal agreement entered into by those found to have been conspirators. This contention of petitioner is totally without legal merit, much less constitutional merit. Cf. *United States* v. *Sarno*, 456 F.2d 875, 878 (1 Cir. 1972).

In addition to the above four points which were orally argued by counsel for petitioner, in his memorandum of law petitioner raises the contention that the participation of the Massachusetts Crime Commission in the procurement of the indictments by the grand jury violated the equal protection clause of the Fourteenth Amendment. No socially useful purpose will be served by this Court's rehashing the proper disposition of these contentions which was made by the Supreme Judicial Court at pp. 1371-82 of its opinion. Petitioner's contentions in this regard do not fall within the guidelines announced by the Supreme Court in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973), (1) because the procedure followed by the Commonwealth in connection with the small loan cases so-called was not a "classification" by the state which impinged on petitioner's constitutional rights; and (2), even if the procedure could be so characterized it served a legitimate state purpose.

Nothing in the equal protection clause forbids the use of different state methods of prosecution if they serve a rational purpose. See *Johnson* v. *Louisiana,* 406 U.S. 356, 363 (1972). There, the Supreme Court announced that it found nothing invidious in the classification selected by the state "to facilitate, expedite, and reduce expense in the administration of criminal justice." I rule that petitioner has failed to show that the Massachusetts procedure impinged on any claimed right under the equal protection clause.

Petitioner also contends that the complex nature of the trial itself denied him due process. This contention is self-refuting since it logically boils down to the argument that if defendants commit their criminal conduct in a complex manner they are virtually untriable by the state. This matter likewise was considered and ruled on adversely to petitioner in the opinion of the Supreme Judicial Court

at pp. 1386-93 and at pp. 1474-79. Petitioner has failed to make a showing in support of his contention that the jury was unable to absorb the evidence or to understand the limitations placed on the use of evidence and the instructions of the trial judge. The record shows that the trial judge painstakingly went over every item of evidence with the jury, carefully explained which items were to be considered with reference to each defendant, and also advised that if they could not recall the limitations with regard to a defendant not to consider it against that defendant. The record also shows that in final arguments counsel for the various defendants took advantage of the opportunity to review with the jurors the evidence which referred to the particular counsel's client.

Petitioner's remaining contentions do not warrant any further analysis by this Court and, accordingly, it is

ORDERED:

Respondent's motion to dismiss is allowed and the petition for writ of habeas corpus is denied.

(s) ANDREW A. CAFFREY
ANDREW A. CAFFREY, CH.J.
U. S. D. C.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEMORANDUM AND ORDER
Entered March 4, 1975

After this court issued its decision, December 26, 1974, affirming the district court's dismissal of petitioner's petition for a writ of habeas corpus, petitioner filed a timely petition for rehearing.

We have carefully considered the petition and in response thereto have amended the opinion issued December 26, 1974, in xerox form, as reflected in the printed opinion issued this day.

The petition for rehearing is otherwise denied.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ORDER OF COURT
Entered March 31, 1975

"Appellant's Second Petition for Rehearing" having been accepted for filing as a motion for recall of mandate and a second petition for rehearing, and the court having found the issues raised therein are without merit,

It is ordered that the said motion and petition are hereby denied.

By the Court:

(s) DANA H. GALLUP, *Clerk.*

APPENDIX E

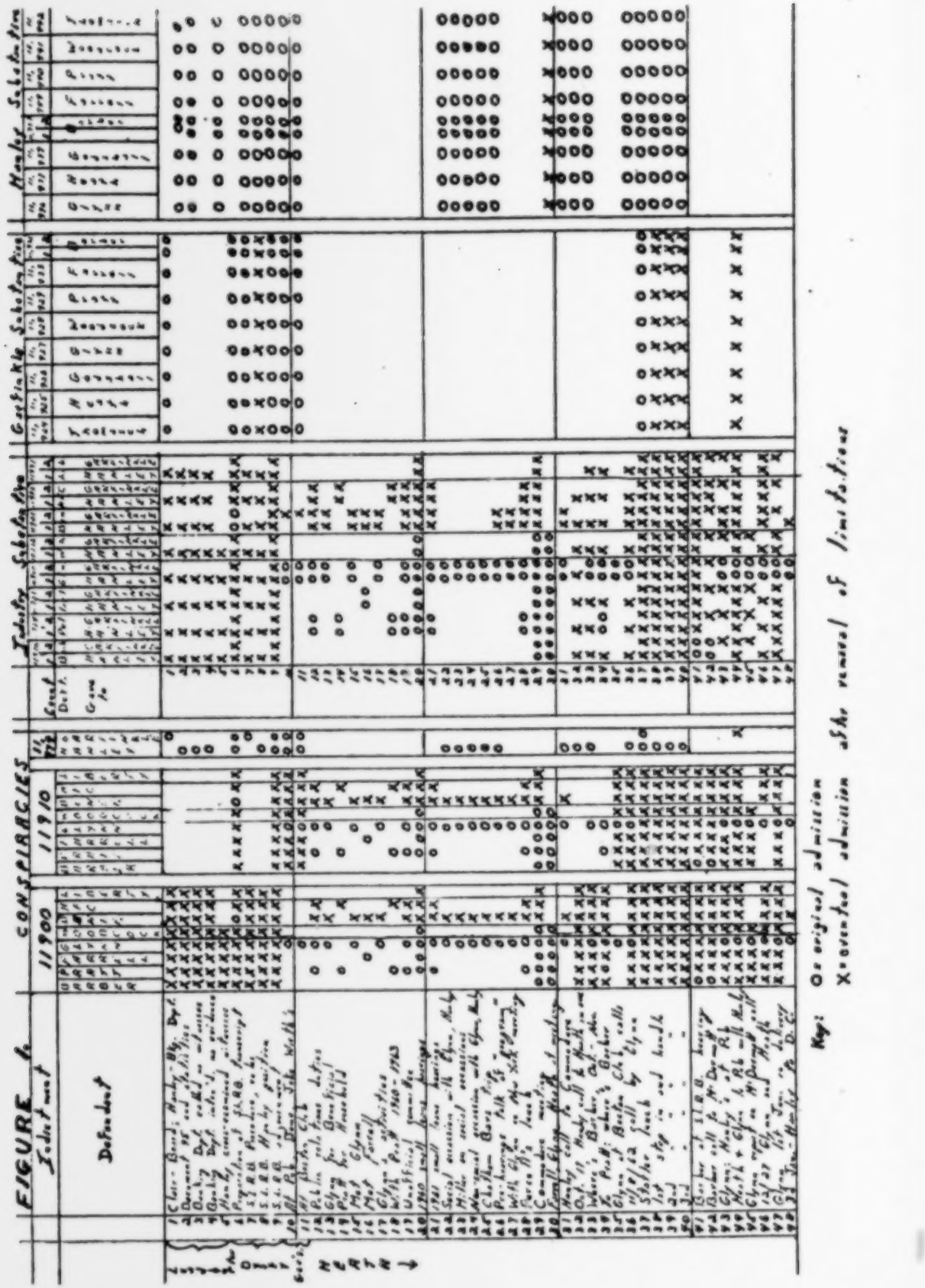
FIGURE 6.
CONSPIRACIES
11900
11910
Defendant
Key: O = original admission
X = eventual admission of his natural

APPENDIX F

[Letterhead — Law Offices —
Featherston, Homans & Klubock]

November 18, 1971

Honorable G. Joseph Tauro
Chief Justice
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: Commonwealth of Massachusetts *v.* Beneficial Finance Company, Et Al

My dear Mr. Chief Justice:

On behalf of Liberty Loan Corporation and Lyle S. Woodcock, we would respectfully request that the Court consider this letter as a Petition For Rehearing on the subject cause, as per custom, on two fundamental issues.

Apparently we did not make sufficiently clear our argument (ps. 47-52 of Consolidated Brief) that *as to us* the evidence of the Commodore meeting could only have resulted in an inchoate agreement. The Court correctly recognized (Opinion p. 110) that "[i]t could hardly be expected that any of the individual defendants would conspire to pay, or would pay, the substantial amount of money here involved . . . out of his own pocket." Therefore, unless the individuals at the Commodore meeting could be found to be authorized by their corporations to make binding agreements, the conspiracy was at best inchoate when the meeting adjourned. The Court met our argument (Opinion ps. 75-76) by referring to that later portion of the opinion which held that there was sufficient evidence that the "participants in the Commodore Hotel meeting had the authority to speak on behalf of their corporations."

Even if *arguendo,* Woodcock had such authority, the evidence was uncontradicted that Heath, Godshall, and Thomasch had none (see p. 48 our Consolidated Brief for transcript citations), and as the Court's opinion recognizes (ps. 48-49) *none of the evidence of the authority of Farrell, Glynn, Barber, or Pratt was ever admitted against Liberty or Woodcock.* As to Woodcock, therefore, on the evidence, the people he was talking to had no authority to make binding agreements. Whatever *other* evidence of the others' authority, the Court could consider *only* the evidence admitted against Woodcock and Liberty, *Commonwealth* v. *Stasiun,* 349 Mass. 38, and that evidence was, as demonstrated, insufficient to warrant a finding that they entered a conspiracy at the Commodore, and that meeting, of course, is their first and last appearance in the case. A directed verdict could be avoided only by considering facts never introduced in evidence against these defendants, and to do so would, of course, be a denial of due process of law.

The Court affirmed the denial of directed verdicts on the substantive indictments by ruling: "One may be convicted as a principal where he delegates to an agent the authority to do the act." (Opinion p. 194). On the previous page of the opinion, however, the Court cited *Commonwealth* v. *French,* 1970 Adv. Sh. 619, its most recent prior opinion in point, yet offered no explanation for the obvious discrepancy between the above ruling and the holding in *French,* where Limone, who initiated the murder and paid an agent (Baron) to commit it *was convicted as an accessory before* the fact, not, as was here required, as a principal. Inescapably, either the Court is now saying that Limone was a principal and not an accessory before the fact or the Court should have recognized that Liberty and Woodcock could not have been convicted as principals. This anomaly violates both the constitutional prohibitions against *ex post facto* laws (a *sub silentio* application of

G.L. (Ter. Ed.) c. 274, §2 as amended in 1968, see, *Commonwealth* v. *Benjamin,* 1971 Adv. Sh. 141) and denies equal protection of the laws (these defendants were convicted as principals on evidence which heretofore made them only accessories).

The Court is, therefore respectfully requested to reconsider and rehear the defendants, Liberty Loan Corporation and Lyle S. Woodcock, on these two fundamental issues.

Respectfully yours,

DANIEL F. FEATHERSTON, JR.
45 School Street
Boston, Massachusetts 02108
ROBERT V. MULKERN
332 Main Street
Worcester, Massachusetts 01608

DFF,JR./mi

cc:

HONORABLE R. AMMI CUTTER
HONORABLE PAUL C. REARDON
HONORABLE JACOB J. SPIEGEL
HONORABLE ROBERT BROUCHER
JOHN J. CURTIN, Esquire
Special Assistant Attorney General
All Defense Counsel
JOSEPH J. BALLIRO, Esquire
DAVID BERMAN, Esquire

APPENDIX G

[Letterhead — SUPREME JUDICIAL COURT]

November 23, 1971

Daniel F. Featherston, Jr., Esquire
45 School Street
Boston, Massachusetts 02108

Dear Sir:

Your request for rehearing in *Commonwealth* v. *Beneficial Finance Co.* has been considered by the court and is denied.

Yours, truly,
(s) R. AMMI CUTTER